United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,983

492

DAVID ZAROFF,

Appellant,

v.

TALLY R. HOLMES, et. al.,

Appellees.

Appeal from the United States District Court
for the District of Columbia

ROBERT M. PRICE

1028 Connecticut Avenue, N. W.
Washington, D. C.

Attorney for Appellant

QUESTION PRESENTED

1. Is a Dismissal for want of prosecution pursuant to Local Rule 12(b) a final adjudication of the merits of the Complaint?

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TABLE OF AUTHORITIES

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia granting the Appellee's Motion for Summary Judgment. Jurisdiction of the District Court was based upon Title 11, Section 306, District of Columbia Code, 1961 Edition, as amended. Jurisdiction of this Court is by virtue of Title 28, Section 1291 of the United States Code.

STATEMENT OF THE CASE

The sole question here involved is whether the Court below was justified under Rule 56 of the Federal Rules of Civil Procedure in sustaining defendants' (Appellees') Motion for Summary Judgment.

On January 28, 1963, the Appellee, through counsel, filed a Complaint to reform deeds of trusts and deed of trust notes. On April 10, 1964, counsel for Appellant withdrew from the case; Appellant diligently retained new counsel, Arthur Peisner, who noted his appearance on April 11, 1964. Two months after his entry into the case, Mr. Peisner filed a Certificate of Readiness. Subsequent to filing the Certificate of Readiness, however, Mr. Peisner's own criminal conviction in the State of Maryland was confirmed by the Maryland Court of Appeals. During the fall of 1964, Mr. Peisner was preoccupied with preparing, *pro se*, his own Petition for Certiorari to the United States Supreme Court. It was during this period that he received notice to appear at pre-trial. The Appellant herein had no notice that a pre-trial had been set in his case. Prior to Mr. Peisner's closing of his office, in January, 1965, he and Appellant agreed to turn over all of Appellant's pending cases to new counsel, Robert M. Price, Esq., counsel herein. At that time, Robert Price did, in fact, file precipices entering his appearance into three cases in which Appellant was a litigant. However, counsel had no knowledge of the instant litigation until Appellant saw the property involved advertised for foreclosure and telephoned counsel herein during October, 1966, as to the status of the case.

The docket entries, together with the knowledge of Mr. Peisner's having had to withdraw from all pending litigation, made it abundantly clear that the case was dismissed due to prior counsel's failure to

appear at a pre-trial conference,[1] and that the Appellant himself had no knowledge of what had transpired, and in truth, was waiting for the case to be reached on the trial calendar. Counsel herein immediately filed a new action (CA 2694-65) based on the same course of action as the prior suit, CA 245-63. In answer to the new action, Appellees filed a Motion for Summary Judgment, maintaining that the dismissal of CA 245-63 was *res judicata*. The District Court granted defendants' (Appellees') Motion for Summary Judgment, which Order Appellants appeal from herein.

STATEMENT OF POINTS

1. The District Court erred in concluding that the September 11, 1964 Order dismissing Civil Action No. 245-63 for want of prosecution constituted a final adjudication on the merits of the Complaint.

2. The dismissal for want of prosecution pursuant to Local Rule 12 of the District Court is without prejudice, does not go to the merits of the action, and is not to be held *res judicata* as a bar to a subsequent action on the same issues.

SUMMARY OF ARGUMENT

Appellant's position is that a dismissal with prejudice implies, and in fact is, a dismissal which went to the merits of the litigation. Such is not the case where a complaint is dismissed for want of prosecution.

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[1] Though a litigant is generally bound by the actions or inactions of his counsel, dismissal for want of prosecution has been held unwarranted where the plaintiff has been diligent in urging prosecution of the case and the delay in prosecution complained of resulted entirely from the neglect of his counsel. Johnson v. Westland Theatres, 117 Colo. 346, 687 P2 932; Munsen v. 1st National Bank, 366 Pa. 211, 77 A2 399.

The case at hand is governed solely by Local Rule 12(b). Although the phrase "dismissed for want of prosecution" is used, no clarification is given as to whether or not it goes to the merits, or is merely procedural. Accordingly, the common law definition should govern. At common law, such dismissals were without prejudice.

Further, the drafters drew a distinction between mandatory dismissal by examiner and permissive dismissal with or without prejudice, by Court. It appears illogical to dismiss for failure to appear at pre-trial, yet not for failure to appear at trial.

Finally, Rule 12 must be read harmoniously with the other local Rules, in particular those placed in the immediate proximity of the Rule in question, *noscitur a socis*. From their very position, Rule 13 must be read together with the wording of Rule 12, if not to modify the preceding rule, at least not to contradict it. Rule 13 refers to dismissals for want of prosecution being without prejudice.

ARGUMENT

Before *res adjudicata* can be invoked, a final judgment, going to the merits, must have been arrived at in the prior action, and "merits" means the "real or substantial grounds of action or defense as distinguished from matters of practice, procedure, jurisdiction or form." *Clegg* vs. *United States* (10th Cir., 1940), 112 F.2d 886, 887. "It is likewise perfectly clear that where a suit is dismissed for a reason which does not go to the merits, a further suit is not barred." *Etten* vs. *Lovell Manufacturing Company* (3rd Cir., 1955), 225 F.2d 884. Thus, the question at hand actually is whether or not the Rule 12(b) dismissal goes to the merits of the case so as to be "with prejudice". The very words, however, "dismissal with prejudice" imply a decision on the merits either after an adjudication of a right or pursuant to an agreement between the parties.

Owen vs. *Simons* (D. C. Ct. App., 1957), 134 A.2d 92. As the Court said in *Karno-Smith Company* vs. *School District of City of Scranton*, (MD Pa., 1942), 44 F. Supp. 860, the dismissal for want of prosecution being without prejudice is "but an application of the general rule that a trial upon which nothing was determined cannot support a plea of *res adjudicata*. . ." Since Appellee in his pleadings and argument in support of their Motion below referred to both Local Rule 12(b) and Rule 41, Federal Rules of Civil Procedure, it is appropriate to discuss which rule governs. We submit that the instant case is governed by Local Rule 12(b) and any reliance upon Federal Rule 41 is inappropriate.

First, along the top edge of the Order dismissing Civil Action 245-63 are the words "Dismissal under Local Civil Rule 12(b)". Since this local rule is not inconsistent with the Federal Rule, the local rule governs. See *U. S.* vs. *Thompson* (DC NY, 1953), 114 F. Supp. 874, in which the Court held that a dismissal under local rules was a dismissal not provided for in Rule 41. See also *Burns Mortgage Company* vs. *Stoudt*, 2 FRD 219; 5 Moores Fed. Prac. 1036.

Moreover, Federal Rule 41(b) makes no provision for a dismissal by the Court *su sponte*, for failure to prosecute. In the case under consideration, however, the defendants never moved to dismiss and, therefore, there was no proceeding under Rule 41(b).

ANALYSIS OF LOCAL RULE

Under the common law, a judgment dismissing an action for plaintiff's failure to prosecute was not a bar to the plaintiff from maintaining another action on the same cause. *Madden* vs. *Perry* (7th Cir., 1959), 264 F.2d 169, *Pueblo De Taos* vs. *Archuleta* (10th Cir., 1933), 64 F.2d

807, and cases cited therein. This was also the rule in this jurisdiction: *Federwisch* vs. *Alsop*, 18 App. D. C. 318, *Wagenhurst* vs. *Wineland*, 22 App. D. C. 356. From the foregoing, it is seen that to equate a dismissal for want of prosecution to a dismissal with prejudice would be contrary to the common law, and, therefore, a diminuation of the rights of the litigants.

Professor Sutherland expressed it: "If a change in the common law is to be effectuated, the legislative intent to do so must be clearly and plainly expressed". 3 Sutherland, 6201 and cases cited therein. This very issue was raised in *Thomas* vs. *U. S.* (6th Cir., 1951), 189 F.2d 494, wherein the Court held that words and phrases having a well defined meaning in the common law are to be interpreted in the same sense under the statute when used in connection with the same or similar subject matter with which they were associated at common law. See also: *Hite* vs. *U. S.*, (10th Cir., 1948), 168 F.2d 973; *Reynolds* vs. *U. S.* (D Kan., 1951), 96 F. Supp. 257. Appellant urges that in the absence of expressed statutory language, the traditional view of a dismissal for want of prosecution being without prejudice should control.

Secondly, a careful reading of Section B, Local Rule 12, standing alone, implies that the drafters indeed did distinguish between dismissals with and without prejudice, and intended Section B to encompass only the latter.

It will be noted that the drafters of the rule made the distinction between failure to appear before the pre-trial Judge in which case "he may act as in the case of non-appearance for final trial", and "failure to appear at the time set for pre-trial hearing before the pre-trial examiner, the examiner shall enter the case dismissed for want of prosecution". It is apparent that the Court has discretion over what its Order shall encompass, that is, whether it should be with or without prejudice;

but not so the pre-trial examiner, whose dismissal must be "for want of prosecution" and in the absence of a specific statute or rule, such a dismissal has always been without prejudice.[2] Further, it is inconsistent to assume that failure to appear before a pre-trial examiner must result in an automatic prejudicial dismissal, whereas a failure to appear before a pre-trial Judge may, or may not have such an effect.

The preceding analysis is corroborated by a reading of Rule 12 in the context in which it is found in the rules,[3] for the very next rule, Local Rule 13 is entitled "Dismissal for failure to prosecute" and is an explanation of the effect of such an Order. Paragraph A of Rule 13 explicitly states in its heading that it is a dismissal without prejudice. The pertinent part of Rule 13 reads: "If a party seeking affirmative relief fails for six months from the time action may be taken to comply with any law, rule or order requisite to the prosecution of his claim . . . . the complaint . . . . shall stand dismissed without prejudice". The paragraph continues to instruct the clerk that if five months following the date upon which action should have been taken, the required action has still not been taken, the inactive party is to be warned of this dismissal pursuant to this rule, which dismissal for want of prosecution will follow thirty days thereafter.

In the absence of clear language to that effect, it is extremely difficult to imagine that the rules contemplate a dismissal for want of prosecution under Rule 12 being with prejudice and at the same time, a dismissal for want of prosecution under Rule 13 being without prejudice.

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[2] The Court, of course, may always exercise its discretion on Motion to dismiss with prejudice to protect the moving party from harassment.

[3] Since the inquiry at hand is to determine what was actually intended by Rule 12, we should proceed as with any other writing, and that is to construe it with reference to the instrument as a whole, for a proper interpretation of any single section must be able to produce a harmonious whole. 2 Sutherland, Statutory Construction S. 4703.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgment of the District Court should be reversed, and this case remanded for trial upon its merits.

Respectfully submitted,

ROBERT M. PRICE
1028 Connecticut Avenue, N. W.
Washington, D. C.
Attorney for Appellant

APPENDIX

U.S. DISTRICT COURT RULES

RULE 12
PRE-TRIAL

(a) FEDERAL RULE 16 TO APPLY. Cases on the pre-trial calendar shall be pre-tried as provided by Rule 16 of the Federal Rules of Civil Procedure.

(b) FAILURE TO APPEAR OR TO FILE PRE-TRIAL STATEMENT. If counsel for any party fails to appear when an action is reached in any call of the pre-trial calendar before the Pre-trial Judge, he may act as in the case of non-appearance for final trial. If counsel for plaintiff fails to appear at the time set for pre-trial hearing before the Pre-trial Examiner, the Examiner shall enter his default. If any party fails to file with the Pre-trial Examiner timely his pre-trial statement, the Examiner shall act as provided in the case of failure to appear for the pre-trial hearing. (Revised January 29, 1960)

* * * * *

(c) Pretrial hearings shall be conducted by the Pretrial Examiner, or the Assistant Pretrial Examiner, under the direction and supervision of the Pretrial Judge, or by the Pretrial Judge. (Added November 10, 1959)

(d) Periodic calendar calls shall be conducted by the Pretrial Examiner, or the Assistant Pretrial Examiner, at the direction and under the supervision of the Pretrial Judge. (Added November 10, 1959)

(e) If in any matter coming before the Pretrial Examiner, or the Assistant Pretrial Examiner, it appears that a ruling or decision of the Court is necessary or desirable, the matter shall be referred to the Pretrial Judge. If in any case the Pretrial Examiner, or the Assistant Pretrial Examiner, is of the opinion that the case should be certified to the ~~Municipal Court~~ District of Columbia Court of General Sessions, he may so recommend and submit the matter to the Pretrial Judge for decision.

(f) PRETRIAL ORDER. The pretrial order when signed by the Pretrial Examiner or Assistant Pretrial Examiner shall become the order of the Court, unless within five days from the date of said order, counsel for any party files with the Clerk of the Court written objections thereto. (Revised March 12, 1962)

(g) OBJECTIONS TO EXAMINER'S ORDER. In the event objections to the pretrial order as signed by the Pretrial Examiner or Assistant Pretrial Examiner are filed timely, the matter shall be set down for hearing before the Pretrial Judge to adopt, amend, or reject the order of said Examiner. (Revised June 27, 1961)

(h) PRETRIAL PROCEEDINGS. Hearings before the Pretrial Examiner and Assistant Pretrial Examiner shall be conducted pursuant to the "Pretrial Instructions to Counsel" approved by the Court. [See Appendix] (Revised June 27, 1961)

(i) REFUSAL TO STIPULATE. If at pretrial counsel for any party refuses to stipulate as to any matter of fact or the genuineness of any document and at trial the party requesting the stipulation proves the truth of any such matter of fact or the genuineness of such document, and the trial court finds that the truth of such fact or the genuineness of such document was within the knowledge of counsel at the pretrial hearing and his refusal to stipulate at pretrial was not made in good faith, the trial judge may impose such sanction as he deems proper. (Revised March 12, 1962)

If the request for stipulations at pretrial are made in full compliance with all the provisions of Rule 36, F.R.C.P., and thereafter the truth of the fact or genuineness of the document as to which stipulation was requested is proved, the trial court may impose the sanction provided by Rule 37(c), F.R.C.P. (Revised March 12, 1962)

RULE 13

DISMISSAL FOR FAILURE TO PROSECUTE
(Revised June 27, 1961)

(a) DISMISSAL WITHOUT PREJUDICE; NOTICE OF; WARNING.

If a party seeking affirmative relief fails for six months from the time action may be taken to comply with any law, rule or order requisite to the prosecution of his claim, or to avail of a right arising through the default or failure of an adverse party, or take other action looking to the prosecution of his claim, or to file a certificate of readiness under Rule 11(d) within six months of the date the action is called on the call of the civil calendar, the complaint, counterclaim, cross-claim, or third-party complaint of said party , as the case may be, shall stand dismissed without prejudice, whereupon the Clerk shall make entry of that fact and serve notice thereof by mail upon every party not in default for failure to appear,

of which mailing he shall make an entry. One month prior to the termination of the six month period the Clerk shall warn the dilatory party by mail that his claim will stand dismissed if he fails to comply with this rule, making an entry in the docket of the mailing. (Revised June 27, 1961)

(b) FAILURE TO WARN; EFFECT. A failure of the Clerk to give the warning as above provided will not affect the running of the six months' period or other wise relieve a party from operation of this rule.

(c) ACTION FROM ~~MUNICIPAL COURT~~ DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS; FAILURE TO PAY FILING FEE. If the plaintiff in an action certified from the ~~Municipal Court~~ District of Columbia Court of General Sessions on a plea of title fails to pay the filing fee within ten days from approval by the ~~Municipal Court~~ District of Columbia Court of General Sessions of the undertaking required by Title 11, Section 738 of the District of Columbia Code (~~1951~~) (1961), the defendant may pay the same and move to have the action dismissed.

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[Filed October 28, 1965]

JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL

DAVID ZAROFF
1407 H Street, N. E.
Washington, D. C.,

Plaintiff,

-vs-

Talley R. Holmes
1345 T Street, N. W.
Washington, D. C.

and

J. Robert Capott
1007 Monroe Street, N. W.
Washington, D. C.

and

Frederick O. Petite
1504 Girard Street, N. W.
Washington, D. C.,

Defendants.

Civil Action No. 2694-65

COMPLAINT TO REFORM DEEDS OF TRUST AND DEED OF TRUST NOTES AND TO VOID FORECLOSURE AFFECTING REAL PROPERTY AND TO VOID DEED OF TRUST NOTES.

COUNT 1.

1. The jurisdiction of the Court is evoked under Title 11, Section 306, of the District of Columbia Code, 1961 as amended.

2. Plaintiff is a citizen of the United States, whose address is 1407 H Street, N. E., in the District of Columbia.

3. Defendant Talley R. Holmes is a citizen of the United States residing at 1345 T Street, N. W., in the District of Columbia; defendant J. Robert Capott is a citizen of the United States residing at 1007 Monroe Street, N. W., in the District of Columbia; and Frederick O. Petite is a citizen of the United States residing at 1504 Girard Street, N. W., in the District of Columbia.

4. On or about August 22, 1962 William Whitted and wife Dorothy Whitted acquired by purchase a fee simple title to the premises known as 714 Florida Avenue, N. W. (Lot 813, Square 416) in the District of Columbia. To obtain funds sufficient to consumate the transaction the said persons caused a series of transactions in concert with defendant Talley R. Holmes and/or his agent or representative designed to conceal a usurious loan whereby a deed of trust note in the amount of $2,500.00 was executed, secured by a deed of trust on the aforesaid property, but there was received therefrom only the sum of $1,200.00 from the said note. The said note bears interest at the rate of six (6%) percent per annum on the unpaid balance. The true owner of the said note at all times was intended to be defendant Talley R. Holmes and the owner of said note is now the said Talley R. Holmes, who obtained the note on August 22, 1962, the time of settlement of the entire transaction, at Realty Title Insurance Company, Inc., 1424 K Street, N. W., now known as District Realty Title Company, Inc., in the District of Columbia.

5. The defendant Talley R. Holmes is not a holder in due course of the said second deed of trust and note. The transactions on or about August 22, 1962 culminating in the ownership by Talley R. Holmes of a second deed of trust and note in the face amount of $2,500.00, bearing six (6%) percent interest per annum, for which the said defendant paid and/or loaned the sum of $1,200.00 was a fraudulent scheme and device engaged in by the defendant Talley R. Holmes, his agent and/or representative, to conceal a usurious loan.

6. On or about September 26, 1962 the plaintiff David Zaroff obtained title in fee simple to the aforesaid property known as 714 Florida Avenue, N. W., in the District of Columbia (Lot 813, Square 416), by deed from William Whitted and wife Dorothy Whitted and has continued thereafter to hold said title.

7. The defendant Talley R. Holmes caused the said property to be advertised for sale at public auction on September 29, 1965, although the full payment of all delinquent payments and all costs to that date to the defendant Talley R. Holmes were offered to him, and the said premises was sold at auction to plaintiff, David Zaroff, for the sum of $15,500.00 over and above the existing first deed of trust.

8. On or about August 22, 1962 Mabel Whitted acquired by pur-

fee simple title to the premises known as 716 Florida Avenue, N. W. (Lot 18, Square 416) in the District of Columbia. To obtain funds sufficient to consummate the transaction there was caused a series of transactions in concert with defendant Talley R. Holmes and/or his agent or representative designed to conceal a usurious loan whereby a deed of trust note in the amount of $2,500.00 was executed, secured by a deed of trust on the said property, but there was received only the sum of $1,200.00 from the said note. The said note bears interest at the rate of six (6%) percent per annum on the unpaid balance. The true owner of said note at all times was intended to be defendant Talley R. Holmes and the owner of said note is now the said Talley R. Holmes, who obtained the note at the time of settlement of the entire transaction at Realty Title Insurance Company, Inc., 1424 K Street, N. W., now known as District Realty Title Company, Inc., in the District of Columbia, on August 22, 1962. Settlement of this property was made at the same time, and in conjunction with, settlement of the property known as 714 Florida Avenue, N. W., in the District of Columbia, both settlements being dependent upon each other.

9. The defendant Talley R. Holmes is not a holder in due course of the said second deed of trust and note affecting the property known as 716 Florida Avenue, N.W. The transactions on or about August 22, 1962 culminating in the ownership by Talley R. Holmes of a second deed of trust and note in the face amount of $2,500.00 bearing six (6%) percent interest per annum, for which the said defendant paid and/or loaned the sum of $1,200.00 was a fraudelent scheme and device engaged in by the defendant Talley R. Holmes, his agent and/or representative, to conceal a usurious loan.

10. On or about September 26, 1962 the plaintiff David Zaroff obtained title in fee simple to the aforesaid property known as 716 Florida Avenue, N.W., in the District of Columbia (Lot 18, Square 416), by deed from Mabel Whitted and has continued thereafter to hold said title.

11. The defendant Talley R. Holmes caused the said property to be advertised for sale and to be sold at public auction on September 29, 1965, although the full payment of all delinquent payments and all costs to that date to the defendant Talley R. Holmes were offered to him, and said premises was sold at auction to David Zaroff, the plaintiff herein, for the sum of $7,700.00, over and above the existing first deed of trust.

12. The defendants J. Robert Capott and Frederick O. Petite are sued in their individual capacities as trustees on the notes complained of herein.

13. This suit is being brought with the full concurrence of the aforementioned William Whitted and wife Dorothy Whitted, makers of the notes complained of herein, both of whom will be able to testify at trial.

WHEREFORE, the premises considered, the plaintiff prays as follows:

1. The foreclosure sale authorized and/or instituted by defendants J. Robert Capott and Frederick O. Petite, as trustees, and by defendant Talley R. Holmes, on September 29th, 1965, affecting the properties known as 714 and 716 Florida Avenue, N. W., in the District of Columbia, being

Lots 813 and 18, Square 416, shall by this Court be vacated, set aside, and held for naught, and the entire cost thereof shall be borne by defendants.

2. The aforementioned deeds of trust and notes, being infected with usury, the defendants J. Robert Capott and Frederick O. Petite, as trustees, shall be caused by this Court to release the respective second deeds of trust on the properties known as 714 and 716 Florida Avenue, N. W., in the District of Columbia, being Lots 813 and 18, Square 416, and The Plaintiff shall have judgment for reformation of the second deeds of trust and second deed of trust notes, respectively, on the properties 714 and 716 Florida Avenue, N.W., in the District of Columbia, being Lots 813 and 18, Square 416, to the extent that same shall reflect the sum of $1,200.00 paid by defendant Talley R. Holmes as to each of said notes, with full credit for all payments made thereon and without interest.

3. And for such other and further relief as may seem just and proper.

COUNT 2.

1. The Plaintiff alleges and incorporates herein the contents of paragraphs numbered 1 to 13, inclusive of COUNT 1, as if the same shall be expressly set forth in this COUNT 2.

Previous to, and at all times involving the subject transactions, the defendant Talley R. Holmes has engaged and is continuing to engage in a course of business and conduct involving the lending of money in the District of Columbia in violation of Title 26, Section 601, of the District of Columbia Code (1961) as amended; although engaged in the business of lending money within the provisions of the aforesaid law of the District of Columbia, the defendant Talley R. Holmes has not obtained a license therefor from the District of Columbia and at all times involving the subject transactions did not possess such license from the District of Columbia; and the said deed of trust notes evidencing the loans of

Lots 813 and 18, Square 416, shall by this Court be vacated, set aside, and held for naught, and the entire cost thereof shall be borne by defendants.

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3. And for such other and further relief as may seem just and proper.

COUNT 2.

1. The Plaintiff alleges and incorporates herein the contents of paragraphs numbered 1 to 13, inclusive of COUNT 1, as if the same shall be expressly set forth in this COUNT 2.

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The parties, the allegations of fact, and the relief sought, in Civil Action No. 245-63 are identical in all respects with the parties, the allegations of fact and the relief sought in the instant action, Civil Action No. 2694-65.

On September 11, 1964 an order was entered in case number 245-63 dismissing the said cause for failure to prosecute. Said order constituted an adjudication on the merits. No appeal was taken from the said order of September 11, 1964 dismissing the cause for failure to prosecute and the time for taking an appeal from said order has expired.

The said order of September 11, 1964, still stands and has not been altered by any subsequent order of this Court.

The grounds for this motion are more fully set forth and spelled out in the statement of points and authorities annexed hereto.

Respectfully submitted,

COBB, HOWARD, HAYES & WINDSOR
By:

/s/ George E. C. Hayes

and

/s/ George H. Windsor
Counsel for defendants

[Certificate]

[Filed November 24, 1965]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR ORDER DISMISSING COMPLAINT

Reference is made to the Statement of Undisputed Facts which is being filed herewith in accordance with Local Rule 9(h).

This motion is made under Federal Rule of Civil Procedure 56.

Where, as here, a claim has been finally adjudicated on the merits, the matter is res judicata, and a dismissal for failure to prosecute is an

American National Bank and Trust Company of Chicago v. United States, 79 U.S. App. D.C. 62, 142 F. 2nd 571 (1944), Slack v. Rich, 87 U.S. App. D.C. 123, 182 F. 2nd 706 (1950); Rule 41 of the Federal Rules of Civil Procedure.

The Local Rules of this Court provide that an order of dismissal for failure to prosecute entered by the pretrial examiner is the action of the Court. Rule 12(b) of the Local Rules provides in pertinent part as follows:

> If counsel for plaintiff fails to appear at the time set for pretrial hearing before the pretrial examiner, the examiner shall enter the case dismissed for want of prosecution.

Local Rule 12(f) provides in pertinent part:

> The pretrial order when signed by the pretrial examiner or assistant pretrial examiner shall become the order of the Court, unless within five days from the date of said order, counsel for any party files with the clerk of the Court written objections thereto.

A reading of the Pretrial Instruction issued by the Court makes it abundantly clear that it is the overall intention behind the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the District of Columbia that the pretrial proceedings are a necessary and invaluable part of the proceedings in any cause, and that the pretrial examiner may finally dispose of any cause on its merits in favor of a party against whom relief is sought by dismissing it when the party who is seeking relief fails to go forward at the time when the case is called for pretrial hearing.

COBB, HOWARD, HAYES & WINDSOR
By:

/s/ George E. C. Hayes

/s/ George H. Windsor

[Filed November 24, 1965]

STATEMENT OF UNDISPUTED FACTS

Civil Action No. 245-63 was filed on January 28, 1963 in this Court. The complaint in said case is incorporated by reference in this statement. All three defendants were served on January 31, 1963. All of the defendants answered on February 20, 1963.

On April 10, 1964, Irving Pressman, Esq., 1010 Vermont Avenue, N. W., withdrew his appearance as attorney for the plaintiff. The consent of the plaintiff, David Zaroff, was indicated on the pracipe.

On April 11, 1964, Arthur A. Peisner, Attorney at Law, 412 5th Street, N. W. #307, entered his appearance as attorney for the plaintiff, David Zaroff.

On June 15, 1964, plaintiff's attorney, Arthur A. Peisner, filed a certificate of readiness, and copies of same were mailed to the attorneys for the defendants.

On September 11, 1964, and order was entered entitled "Cause Dismissed For Want Of Prosecution". This order reads as follows:

> "This cause being duly assigned for pretrial this 11th day of September, 1964, and the same having been called and no response thereto having been made by plaintiff, and no pretrial statement having been filed.
>
> It is ordered that this cause be, and the same hereby is dismissed for want of prosecution.
>
> WHEREFORE, it is adjudged that plaintiff take nothing by action, that defendant go hence without day, be for nothing held, and recover of plaintiff his cost of defense."

No further action was taken by any other parties in this case subsequent to the entry of the order of September 11, 1964.

COBB, HOWARD, HAYES & WINDSOR
By:

/s/ George E. C. Hayes

[Filed December 23, 1965]

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR ORDER DISMISSING COMPLAINT

Plaintiff, through counsel, opposes the defendants' Motion filed herein and in support of said opposition respectfully calls the Court's attention to the Order dated September 11, 1964 in Civil Action 245-63, and referred to by defendants in their Motion. Said Order did dismiss CA 245-63 for failure to prosecute, and as such did not constitute an adjudication upon the merits.

Respectfully submitted,

/s/ Robert M. Price

* * * * * * * * *

[Certificate]

[Filed January 3, 1966]

POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE FOR ORDER DISMISSING COMPLAINT.

The plaintiff is in accord with the defendants' statement filed pursuant to Local Rule 9(h). The plaintiff submits that throughout defendants' Motion and Points and Authorities it erroneously refers to the dismissal of CA 245-63 under Local Rule 12(b) as having been a final adjudication on the merits.

Rule 12(b) of our Local Rules of Civil Procedure, under which CA 245-63 was dismissed, specifically dismisses a case "for want of prosecution."

Rule 13 further clarifies such a dismissal. It reads in pertinent part:

> "Local Rule 13: Dismissal for failure to prosecute
> (a) If a party seeking affirmative relief. . .fails. . .
> to take other action looking to the prosecution of
> his claim. . .the Complaint. . .shall stand dismissed
> without prejudice. . ."

We submit that, from their very positions in the Rules, the language of Rule 13 modifies and indeed must be read together with the wording of Rule 12.

The defendants' reference to Rule 41 of the Federal Rules of Civil Procedure is not applicable in this instance. Rule 41 reads in part: "Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision. . .operates as an adjudication upon the merits." (See American National Bank and Trust Company v. United States, 142 F.2d 571 (1944)).

The pretrial examiner's order specified that it was pursuant to Local Rule 12(b). This is clearly within the contemplation of the Federal Rules phraseology and is precisely the Court specifying "otherwise".

Respectfully submitted,

/s/ Robert H. Price

* * * * * * *

[Filed January 14, 1966]

SUMMARY JUDGMENT FOR DEFENDANTS

This cause was heard by the Court on January 5, 1966, upon the motion of defendant, Talley R. Holmes, the statement of undisputed facts, points and authorities in support of motion for summary judgment or in the alternative for order dismissing complaint, plaintiff's opposition to defendant's motion for summary judgment or in the alternative for order dismissing complaint and points and authorities in support of said opposition, and oral argument of counsel for defendant, Talley R. Holmes and plaintiff, David Zaroff.

It appears to the Court that the following facts are undisputed:

1. That defendant, Talley R. Holmes, is the holder of second trust notes secured by premises 714 and 716 Florida Avenue, N. W. in the District of Columbia.

2. That defendants, J. Robert Capott and Frederick O. Petite are trustees in the deeds of trust referred to in paragraph 1 and recorded among the land records of the District of Columbia in Liber 11860 at Folio 232 and 280, respectively.

3. That in Civil Action No. 245-63 in this Court the plaintiff, David Zaraoff, sued defendants, Talley R. Holmes, J. Robert Capott and Frederick O. Petite seeking to have the aforementioned deeds of trust declared invalid.

4. That this Court on September 11, 1964, dismissed the complaint in Civil Action No. 245-63 under Rule 12 of the local rules of this Court for want of prosecution.

5. That subsequent to September 11, 1964, no further proceedings have taken place in Civil Action No. 245-63.

6. That in October of 1965 the present proceeding, Civil Action No. 2694-65, was instituted by David Zaroff as plaintiff against Talley R. Holmes, J. Robert Capott and Frederick O. Petite as defendants. The parties, the facts alleged and the relief sought in the present action, Civil Action No. 245-63, are the same as the parties, the facts alleged and the relief sought in Civil Action No. 245-63 in this Court.

From the foregoing undisputed facts the Court concludes as a matter of law:

1. This Court's judgment of September 11, 1964, entered in Civil Action No. 245-63 dismissing the said cause for want of prosecution constituted a final adjudication on the merits of the claims set forth in the complaint therein by plaintiff, David Zaroff, against defendants, Talley R. Holmes, J. Robert Capott and Frederick O. Petite in favor of defendants against the plaintiff.

2. The plaintiff in Civil Action No. 2694-65, David Zaroff, is not entitled to the relief sought in the complaint against Talley R. Holmes, J. Robert Capott and Frederick O. Petite, including specifically, but not limited to, the claims for declaration that the second trust notes held by defendant, Talley R. Holmes, and the deed of trust which secured said notes covering premises 714-16 Florida Avenue, N. W. in the District of Columbia are not valid and enforceable.

On the basis of the foregoing Findings and Conclusions it is by the Court this 14th day of January, 1966,

ORDERED, ADJUDGED AND DECREED:

1. That the motion of defendant, Talley R. Holmes, for summary judgment be and the same hereby is granted and

2. That the complaint in this cause be and the same hereby is dismissed with prejudice.

/s/ John J. Sirica
Judge

[Certificate]

[Filed January 19, 1966]

ORDER DENYING MOTION FOR RECONSIDERATION

Upon consideration of the motion of plaintiff David Zaroff to reconsider the order granting the motion of defendant Holmes for summary judgment and the opposition thereto, it is by the Court this 19th day of January 1966,

ORDERED that the motion to reconsider be, and the same hereby is, denied.

/s/ John J. Sirica

[Filed January 19, 1966]

NOTICE OF APPEAL

Notice is hereby given this 19th day of January, 1966, that David Zaroff, plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 14th day of January, 1966 in favor of defendants against said plaintiff.

/s/ Robert M. Price
Attorney for Plaintiff

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,983

DAVID ZAROFF,

Appellant,

v.

TALLY R. HOLMES, *et al.*,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE E. C. HAYES
GEORGE H. WINDSOR

613 F Street, N.W.
Washington, D.C. 20004

Attorneys for Appellees

STATEMENT OF QUESTION PRESENTED

In the opinion of the defendant-appellee the question presented is:

Whether, where a plaintiff brings an action in the District Court in 1963 and said action is dismissed for want of prosecution under Local Rule 12(b) on September 11, 1964 and no further action is taken or relief sought from that dismissal, the said plaintiff is precluded from maintaining a subsequent and different action in October 1965 against the same defendants, based on the same facts, and seeking the same relief?

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TABLE OF CASES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,983

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Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEES

COUNTER STATEMENT OF THE CASE

The material undisputed facts which were before the District Court were as follows:

Civil Action No. 245-63 was filed on January 28, 1963 in this Court. The complaint in said case is incorporated by reference in this statement. All three defendants were served on January 31, 1963. All of the defendants answered on February 20, 1963.

On April 10, 1964, Irving Pressman, Esq., 1010 Vermont Avenue, N.W., withdrew his appearance as attorney for the plaintiff. The consent of the plaintiff, David Zaroff, was indicated on the praecipe.

On April 11, 1964, Arthur A. Peisner, Attorney at Law, 412 5th Street, N.W. #307, entered his appearance as attorney for the plaintiff, David Zaroff.

On June 15, 1964, plaintiff's attorney, Arthur A. Peisner, filed a certificate of readiness, and copies of same were mailed to the attorneys for the defendants.

On September 11, 1964, an order was entered entitled "Cause Dismissed For Want Of Prosecution". This order reads as follows:

> "This cause being duly assigned for pretrial this 11th day of September, 1964, and the same having been called and no response thereto having been made by plaintiff, and no pretrial statement having been filed,
>
> It is ordered that this cause be, and the same hereby is dismissed for want of prosecution.
>
> WHEREFORE, it is adjudged that plaintiff take nothing by action, that defendant go hence without day, be for nothing held, and recover of plaintiff his cost of defense."

The Pretrial Examiner delivered a copy of this order to counsel for defendant and mailed a copy to counsel for plaintiff at his address of record.

No further action was taken by any of the parties in this case subsequent to the entry of the order of September 11, 1964.

STATUTES AND RULES INVOLVED

In addition to the Rules set forth by the appellant in his brief, the appellee considers the following to be relevant:

Rule 41 of the Federal Rules of Civil Procedure, which provides in pertinent part:

Dismissal of Actions

> (b) Involuntary Dismissal: Effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . *Unless the court in its order for dismissal otherwise specifies, a dismissal* under this subdivision and any dismissal *not provided for in this rule*, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, *operates as an adjudication on the merits*. (Emphasis supplied)

Rule 60 of the Federal Rules of Civil Procedure, which provides in pertinent part:

Relief from Judgment or Order

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or *excusable neglect;* . . . (6) any other reason justifying relief from the operation of the judgment. . . . Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by independent action. (Emphasis supplied)

SUMMARY OF ARGUMENT

The summary judgment in favor of defendant-appellee entered by the District Court on January 14, 1966, should be affirmed.

That judgment is predicated on the legal conclusion that the order entered September 11, 1964 dismissing Civil Action No. 245-63 for want of prosecution, in which Civil Action the same plaintiff sued the same defendants, alleged the same facts, and sought the same relief, as in Civil Action 2694-65 (the case now before this court on appeal) was a final adjudication on the merits of the matters in controversy between these parties, and therefore the present suit is barred.

The Pretrial Examiner, on September 11, 1964, dismissed Civil Action No. 245-63 for want of prosecution when neither plaintiff nor his counsel of record appeared at the time set for pretrial hearing. A copy of his order of dismissal was mailed to plaintiff's counsel of record at his office address. The order was entered under Local Rule 12(b).

The Pretrial Examiner's order became the order of the Court after five days, under Local Rule 12(f), and has not been vacated or modified by the District Court or by this Court on appeal.

Rule 41(b) of the Federal Rules of Civil Procedure provides that any dismissal by the Court whether or not provided for by the Rule, and whether on motion of the defendant or *sua sponte,* unless said order provides otherwise, operates as an adjudication on the merits.

Decisions by this Court, as well as by the District of Columbia Court of Appeals, which construe Rule 41(b) of the Federal Rules of Civil Procedure and the comparable rule of the District of Columbia Court of General Sessions establish the proposition that a dismissal for want of prosecution by the Court bars a subsequent suit under *res judicata* and collateral estoppel.

Local Rule 12(b) provides for dismissal by the Pretrial Examiner for want of prosecution and Local Rule 12(f) makes a dismissal by the Pretrial Examiner the action of the Court where no objection is made to the Court.

The conclusion reached by the District Court that the present action cannot be maintained is thus sound under the express language of the applicable court rules and decisions and also under the well established public policy against multiple law suits to enforce the same claim.

ARGUMENT

I

In the District of Columbia Circuit, a dismissal by the court for want of prosecution, either on motion of defendant or *sua sponte*, is an adjudication on the merits and precludes subsequent action on the same claim.

The clear language of Rule 41(b) of the Federal Rules of Civil Procedure so expressly provides (see language at page 3 of this Brief).

The proposition upon which appellee relies was enunciated and applied by this Court in *American National Bank and Trust Company of Chicago v. United States*, 79 U.S. App. D.C. 62, 142 F.2d 571 (1944). In that case a summary judgment was entered for the defendant by the District Court on the ground that a prior suit on the same claim had been dismissed for want of prosecution. It was affirmed on appeal. The court explained the affirmance as follows (79 U.S. App. D.C. at 63):

> . . . under Rule 41(b) a dismissal on defendant's motion, and likewise a dismissal not provided for in the Rules, "operates as an adjudication upon the merits" unless otherwise specified in the order. The court has inherent power to dismiss, on its own motion, for want of prosecution.

Such a dismissal is not provided for in the Rules, and therefore operates as an adjudication upon the merits. In other words, a dismissal for want of prosecution by the court either upon motion of the defendant or *sua sponte* is an adjudication upon the merits for purposes of applying the rule of *res judicata* to preclude a subsequent suit between the same parties on the same cause of action.

A parallel proposition has been established in the District of Columbia Court of General Sessions, under that court's Rule 41(b). The Municipal Court of Appeals for the District of Columbia (now District of Columbia Court of Appeals), in *Fletcher v. Pickwick, Inc., Etc.*, 140 A.2d 924 (1958), expressly drew the parallel between the Federal Rules and the rules of the Municipal Court (now District of Columbia Court of General Sessions. It affirmed an order of the trial court which on its *own motion* dismissed the complaints for want of prosecution when plaintiff failed to appear for the pretrial hearing.

Thus, there can be no doubt that under the law generally applied in the District of Columbia a dismissal by the court for want of prosecution where the order does not otherwise specify operates as an adjudication on the merits and bars subsequent demands based on the same cause of action, whether the dismissal by the court is upon motion of the defendant or *sua sponte*.

II

An order of the Pretrial Examiner of the District Court, which dismisses a case for want of prosecution and to which no objection has been made, is the order of the Court.

Local Rule 12(b) and the Pretrial Instructions for Counsel issued by the Court, Part VI(2), provide in pertinent part:

> . . . If counsel for plaintiff fails to appear at the time set for pretrial hearing before the Pretrail Examiner, the Examiner will enter the case dismissed for want of prosecution. . . .

And, with respect to the effect of the order of the Pretrial Examiner, Local Rule 12(f) and the Pretrial Instructions, Part III(4)(b), provide:

> The order signed by the Pretrial Examiner will be the order of the Court, unless, within five days from the date said order is signed by such Examiner, counsel for any party files with the Clerk of the Court written objections thereto and serves a copy thereof upon opposing counsel.

It thus appears that the District Court, by rule, has expressly empowered the Pretrial Examiner to enter orders which become the orders of the Court. This practice is an implementation of the well recognized policy against multiple lawsuits to enforce the same claims.

III

Appellant in his brief advances the position that a dismissal for want of prosecution is not based upon a consideration of the merits of the case and therefore is not an adjudication on the merits. This position has been expressly repudiated.

We have demonstrated that the established law is inconsistent with this position.

Appellant also appears to suggest that a dismissal under Rule 12 is the same as a dismissal under Local Rule 13, which is expressly without prejudice. A dismissal under Rule 13, before a certificate of readiness has been filed and the case has not been placed upon the Ready Calendar, is altogether different from a dismissal under Rule 12, which occurs *after* the certificate of readiness has been filed and the case has been placed upon the Ready Calendar. In the latter instance the parties

have certified that discovery and pretrial proceedings have been completed and they are ready to proceed. The express language of the Rules deals with the two situations differently. Rule 41(b) of the Federal Rules of Civil Procedure expressly limits those dismissal orders which adjudicate on the merits to those which do not provide otherwise. Local Rule 13 expressly provides that dismissals under that rule are without prejudice.

CONCLUSION

The Court's order of September 11, 1964 in Civil Action 245-63 is a final adverse adjudication of the merits of the cause of action which plaintiff seeks to assert again in C. A. 2694-65. He cannot now maintain Civil Action No. 2694-65 under the Federal Rules of Civil Procedure, the Local Rules of the District Court, and the decisions of this Court.

Respectfully submitted,

GEORGE E. C. HAYES
GEORGE H. WINDSOR

Attorneys for Appellees